No. 780

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1948.

DISTRICT OF COLUMBIA, *Petitioner*,

v.

THE SMOOT SAND & GRAVEL CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR THE RESPONDENT IN OPPOSITION.

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PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The memorandum opinion of the Board of Tax Appeals for the District of Columbia is not published (R. 43-49). The opinion of the United States Court of Appeals for the District of Columbia (R. 200) has not yet been reported.

Jurisdiction.

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered March

28, 1949 (R. 202). The petition for a writ of certiorari was filed May 11, 1949. The jurisdiction of this Court rests upon 28 U. S. C., Section 1254.

Question Presented.

Whether the Court of Appeals erred in holding that the District of Columbia's contention that its local tangible personal property tax law enacted in 1902 should now be extended by judicial interpretation to cover—at full value, with no apportionment—a Delaware corporation's interstate transportation facilities located primarily in Virginia and Maryland could not be constitutionally sustained.

Stated differently: Did the Court of Appeals err in failing to uphold the District of Columbia's changed interpretation made in 1945 with respect to a local tax statute enacted in 1902 when in the opinion of the Court of Appeals the application of the statute in this case pursuant to such changed interpretation is in violation of the Constitution?

Statutes Involved.

Sections 47-1201, 47-1202, and 47-701, D. C. Code 1940, provide as follows:

> Sec. 47-1201. "*Three assistant assessors to assess personal property.*
>
> The three members of the permanent Board of Assistant Assessors designated by the assessor, to assess personal property, shall under the direction and supervision of the said assessor, assess personal property in the District of Columbia as follows. (July 1, 1902, 32 Stat. 617, ch. 1352, Sec. 6 (par. 1; July 3, 1926, 44 Stat. 832, ch. 759, Sec. 1.)"
>
> Sec. 47-1202. "*Personal property to be t[illegible]d at its full value.*
>
> All personal property in the District of Columbia subject to taxation shall be listed and assessed at not less than the full and true value thereof in lawful money. (July 3, 1926, 44 Stat. 833, ch. 759, Sec. 4.)"

Sec. 47-701. "*Assessments to be made in the name of the owner.*

All real property in the District of Columbia, except as hereinafter provided, shall be assessed in the name of the owner, or trustee or trustees of the owner thereof. * * * (Aug. 14, 1894, 28 Stat. 282, ch. 287, Sec. 1.)"

STATEMENT.

The basic facts involved are as follows:

Respondent was incorporated under the laws of the State of Delaware in September 1927 and has at all times paid the franchise tax imposed by Delaware and maintained its principal office in that State at 7 West 10th Street, Wilmington, Delaware, where it conducts corporate meetings (Tr. 384, 391, App. 23). It is engaged in the business of producing, transporting, and selling sand and gravel (Tr. 327, 328, 384, 385, 419, R. 23). From 1922 until September 1927 the business was carried on by a Virginia corporation known as The Smoot Sand & Gravel Corporation of Virginia (Tr. 327, R. 27-44). Prior to 1922 the business was operated as a sole proprietorship (Tr. 327).

Production of sand and gravel is carried on by respondent in Virginia and Maryland (Tr. 255-261, 358, 359, 384, 385, 420, Ex. 1). The scows, tugs, and launches involved in this controversy are essential and integral parts of the machinery required in the production and processing of material in Virginia and Maryland (Tr. 248-250).

Transportation of sand and gravel is carried on from the points of production in Virginia or Maryland to any point or points on the Potomac River and its tributaries and the Chesapeake Bay and its tributary system of waterways in accordance with the requirements of respondent's customers (Tr. 247, 324, Exs. 1, 2, App. 26). Only 11 miles of this system of waterways extending for hundreds of miles touch upon the District of Columbia (Exs. 1 & 2).

Direction and control of both production and transportation have at all times been carried on primarily from

the State of Virginia, such direction and control being directed principally from Alexandria, Virginia, the Registered Home Port of petitioner's facilities (Tr. 248, 384, 385, 420, Ex. 7-14). The Marine Superintendent in charge of all production and transportation for respondent and the other men in its Production and Transportation Department seldom come into petitioner's Washington office and then only for a few minutes at a time (Tr. 248, 384, 385, 419).

Respondent does not own any deposits of sand and gravel in the District of Columbia and under regulations of the War Department could not dredge material from them if it did own such deposits (Tr. 358, 359, 370). Sand and gravel deposits owned by respondent are located at 13 points along the shores of the Potomac River or its tributaries in Virginia and Maryland, six being in Virginia and seven in Maryland and their distances below Washington ranging from 9½ miles to 51 miles (Tr. 255-261, Ex. 1).

Both production and transportation are often wholly within the State of Virginia, often wholly within the State of Maryland, and often wholly within the States of Virginia and Maryland without in any way touching upon District of Columbia waters (Tr. 255-261, Exs. 1, 2. R. 26). No production from respondent's deposits and deliveries to the District of Columbia were ever wholly within the District of Columbia, inasmuch as such deliveries always involved production in Virginia or Maryland and transportation in one or both States (Tr. 255-261, Exs. 1, 2).

Sales of sand and gravel were made principally in the District of Columbia, Maryland, and Virginia (Tr. 384). However, sales were also made in Delaware, New York, and other states (Tr. 384).

In the normal course of its business, respondent has carried on a large and long established "down river" business in addition to that in nearby Virginia, Maryland, and the District of Columbia (Tr. 293-294, 297, 362, Exs. 1, 2, 4, App. 26). All deliveries of sand and gravel were made

from the points of production in Virginia or Maryland with respondent's own tugs and scows (Tr. 264, 265, 311). Since 1935 the principal down river deliveries on the Chesapeake Bay and its tributary system of waterways, such as the lower Potomac, Patuxent, the Rappahannock, and the Great Wicomico Rivers have been to 22 places in Virginia and 10 places in Maryland at distances from Washington as far as 182½ miles (Tr. 247, 324, Exs. 1, 2, 4, R. 26).

Transportation of material from its deposits in Virginia and Maryland to be used in the construction of the Potomac River Bridge, 61 miles below Washington, affords an illustration of a typical down river delivery (Tr. 265-270, R. 26, Ex. 4).

Deliveries to the Potomac River bridge were made during the period from September 8, 1939 through June 14, 1940, and required all of respondent's steel scows and much of its remaining transportation facilities. Thus, such facilities came into the District of Columbia for less than a total of one week during the entire nine month period immediately preceding July 1, 1940, i. e., the first taxable period involved in this proceeding (Tr. 265-270, 297, 310, R. 26, Exs. 4, 5).

Respondent's "problem is" production "and not unloading" (Tr. 280). The actual time required to load a scow is from approximately 5 to 15 times as great—depending upon whether fine gravel, concrete sand, building sand, or tailings are being loaded—as that required to unload a scow (Tr. 288, 292, 310).

Respondent's scows, tugs, and launches have at all times been primarily located in Virginia and Maryland in every sense of the term primarily. The Board found as a fact and held that these instruments of production in Virginia and Maryland and of water transportation employed in interstate commerce spent more time in Virginia and Maryland than they did in the District of Columbia (R. 36, 43). During the entire period involved in this controversy, they were in Virginia and Maryland more than 58% of the time and during 1945 and 1946, when more nearly normal operations were reestablished, they were in Virginia and Mary-

land more than 66% and 71% of the time, respectively (Tr. 54-59, 309-311, 270-283, 293, 315, 318, Exs. 5, 6).

During all of the years involved the equipment in question has been assessed for tangible personal property taxation by the Virginia taxing authorities at its Registered Home Port of Alexandria, Virginia, and the tax so assessed has always been paid (Tr. 354, 363, 364, R. 30). The *daily* average number of respondent's scows entering or berthed at the Port of Alexandria ranged from a maximum of 31 to a minimum of 2 during the years involved. (Exhibits 5 and 41 and Tr. 274, 277, 324, 364). The Virginia taxing authorities examined the scows for the purpose of increasing the assessments and it has always been respondent's understanding that the scows, along with its other items of floating equipment, were included in the assessment of tax paid each year to the State of Virginia (Tr. 354, 363, 364, and R. 30).

By administrative construction the petitioner has always recognized that the District of Columbia tangible personal property tax law does not provide for taxation of the interstate water transportation equipment involved on the basis of apportionment and has expressly conceded in this case that the "District tax statutes involved do not provide for apportionment." (Tr. 185). Respondent was advised by competent counsel that its transportation facilities here involved and engaged in interstate commerce were not subject to taxation under the terms of the District of Columbia law (Tr. 349, 350, 351, 352, 385, 386, 392).

Nevertheless, respondent has always paid tangible personal property tax to the District of Columbia on an equitable basis mutually agreed upon as a fair amount (Tr. 337-344, 352, 400, 401, 407, R. 27-32). The amount of the assessment agreed upon was revised in the early 1930's and was reviewed and approved by mutual agreement of the parties in 1938 (R. 27-33).

Petitioner's own evidence (R. 85) expressly shows that "The tangible property of The Smoot Sand & Gravel Cor-

poration" involved in this proceeding was "located outside of Washington, D. C." at "various locations in the States of Virginia and Maryland." (Tr. 569-623). Petitioner's own evidence further expressly shows (a) the construction of respondent's transportation facilities in Virginia, Maryland, and elsewhere outside the District of Columbia, (b) respondent's production of all material from "extensive sand and gravel deposits in the States of Maryland and Virginia," (c) respondent's stock piling of approximately one quarter million cubic yards of material outside the District of Columbia after production in Virginia and Maryland, (d) respondent's unloading facilities at Occoquan, Virginia, and Alexandria, Virginia, and (e) additional equipment owned by the respondent at other places along the Potomac River in Virginia and Maryland (R. 83-95, Tr. 569, 623).

ARGUMENT.

I.

There is Clearly No Special or Important Reason for Certiorari in This Case.

It is respectfully suggested that there is no semblance of an adequate ground for the issuance of a writ of certiorari in this case. Obviously, the case involves only the taxation of property engaged in interstate commerce under a highly specialized, if not wholly unique, factual situation.[1] It is believed that the decision of the Court below affects only the taxpayer involved in this proceeding. Consequently, it seems clear that there is no special or important reason for certiorari in this instance.

Moreover, the decision of the Court below is correct. No other result could have been reached because (1) the local

[1] Rail carriers and common carriers by water are taxed by the District of Columbia under entirely different statutory provisions —all of which seemingly comply with Constitutional requirements of due process of law. See D. C. Code 1940, Sections 47-1215 and 47-1212.

statute involved imposes District of Columbia tax only on property that is "in" the District of Columbia on such a basis of permanency that it is out of and beyond the taxing jurisdiction of the States and (2) imposition of District of Columbia tangible personal property tax *at full value—with no apportionment*—on scows, tugs and launches of a Delaware corporation employed in interstate commerce and located primarily in the States of Virginia and Maryland would be in violation of the Constitution.[2]

II.

The 1902 Statute Involved Does Not Impose the Tax in Controversy. This Has Heretofore Always Been Conceded and the Tax in Question Was Exacted for the First Time in 1945.

The present tangible personal property tax law for the District of Columbia was enacted in 1902 after the 1877 law had been declared inoperative. Congressional Record, 57th Congress, Page 4896, *et seq.* It will be noted that Congress imposed the tangibles tax on personal "property *in* the District of Columbia" in the identical language used for the taxation of real "property *in* the District of Columbia." D. C. Code 1940, Sections 47-1201, 47-1202, and 47-701.[3]

From the legislative history of the 1902 law it is clear that Congress taxed for the District of Columbia only prop-

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[2] The decision of the Court of Appeals is clearly correct on the grounds stated and, therefore, the Court did not find it necessary to pass upon either the statute of limitations or valuation issues. See R. 3-7, 97-105, and 110-112.

[3] In this respect it appears that the District's statute by its terms in substance continued for territory ceded from Maryland the requirement that only tangibles "permanently located" in the State are subject to taxation. Maryland Code, Art. 1, Sec. 6. It is to be contrasted with the all inclusive terms of the Virginia law (Constitution of Virginia, Art. 12, Sec. 68 and Tax Code of Virginia, Sec. 283), as well as the all inclusive provisions of the Minnesota Statute (Sec. 272.01, Minnesota Statutes 1941) under which *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 88 L. Ed. 1283 (1944) arose.

erty that was out of the taxing jurisdiction of the States, i.e., the imposition was made only on "taxable wealth" that was "in" the District of Columbia *on such a basis of permanence as to be out of and beyond the taxing jurisdiction of the States.* It is plain that Congress had no desire to impose District of Columbia tangible personal property taxation on property that was subject to the taxing jurisdiction of the States represented in Congress. Thus, in the course of debate on the 1902 law in the 57th Congress, the following appears at page 4951 of the Congressional Record:

> "Mr. Benton. I yield to the gentleman from Missouri (Mr. De Armond) thirty minutes or so much thereof as he may desire.
>
> "Mr. De Armond. Mr. Chairman, the question which is now before the committee and which will later come before the House would seem to the uninitiated to be a very simple one. It is whether personal property *in* the District of Columbia shall be subject to taxation *as is personal property in the States.* * * *
>
> "The people who are to be attracted here by exemption from taxation, it must be supposed, are to come mainly from the different States of the Union—*States having in this body their representatives and at the other end of the Capitol their Senators.* Every rich man who is to be attracted to Washington by exemption from taxation is a man whose personal *property is to be taken out of the taxable wealth of the neighborhood in which he now lives.* In other words, each vote and every act here to entice these men from the States in which they now dwell to the city of Washington is an effort, and, if accomplished, will be a deed, *to take from the taxable wealth of the several communities represented here* and to add it to the non taxable wealth of the great national capital."

In 1945 the District of Columbia confirmed its then understanding and our present understanding of the congressional purpose in enacting the 1902 statute here involved.

On July 17, 1945 Congress was advised by the President of the Board of Commissioners for the District of Columbia that it was felt that railroad rolling stock had not been covered by the 1902 law and could be taxed by the District only on the basis of "specific statutory authority". Congress agreed and, accordingly, in 1945 enacted Section 47-1215 of the District of Columbia Code to cover the taxation of railroad rolling stock both "primarily located in" and "not primarily located in the District of Columbia," the latter being covered by carefully detailed provisions for just and equitable apportionment spelled out in the statute.[4]

It is our further understanding that in the administrative handling of this taxpayer's own personal property taxes the District of Columbia has always heretofore conceded that the District law did not impose tax upon instruments of water transportation employed in interstate commerce which were primarily located outside the District and subject to taxation in Virginia and Maryland. (R. 27-32, 106). Thus, *the District of Columbia's position in this case represents a complete reversal of long standing administrative construction without any change in the law whatsoever.*

We do not know of either justification or explanation as to why the District of Columbia advised Congress in July of 1945 that it "is believed that before" railroad rolling stock engaged in interstate commerce "of the kind included in this bill may be taxed, *there must be specific statutory authority therefor,*" but in August of 1945 made the assess-

[4] If Congress had intended the 1902 statute here involved to apply to tangibles employed in interstate commerce which were subject to taxation in any State or States, it would have (a) used other than real estate taxing language and (b) provided for equitable apportionment. *Cf. Queen City Brewing Co.* v. *District of Columbia*, 134 F. (2d) 44 (1943), *certiorari denied*, 319 U. S. 767, 87 L. Ed. 1716 (1943). That Congress was fully aware of the limitations of the 1902 statute covering tangibles is shown by its enactment of the District statute covering intangibles "wherever located", with the added provision, however, that if tax were paid "in some other jurisdiction" the District intangibles tax would not be imposed. D. C. Code 1940, Sec. 47-1205.

ments involved in the instant case against instruments of water transportation employed in interstate commerce *without any statutory authority therefor—and with no apportionment.*

III.

The District of Columbia's Contention That Its Tangibles Tax Enacted in 1902 Should Now be Extended by Judicial Interpretation to Cover—at Full Value, With No Apportionment—a Delaware Corporation's Interstate Transportation Facilities Located Primarily in Virginia and Maryland, if Sustained, Would Obviously Render the 1902 Law Unconstitutional.

There can be no question that respondent's scows, tugs, and launches have at all times been primarily located in Virginia and Maryland in every sense of the term primarily. Their sole and only function or purpose is to produce sand and gravel from respondent's deposits in Virginia and Maryland and transport such material wherever its customers' needs require. The deposits from which the material is produced in Virginia and Maryland wholly determine the location of its production and transportation facilities in those states and its customers' needs, whether at the Pentagon Building in Virginia, whether at Alexandria, Virginia, whether in the District of Columbia, whether at the Potomac River Bridge, Leonardtown, Tappahannock, or elsewhere in Virginia or Maryland, wholly determine the points to which deliveries are made. The deposits from which the material is produced, however, constantly remain in Virginia and Maryland and the transportation facilities —controlled and directed principally from Alexandria, Virginia—are always returned to those deposits as promptly as possible because they have no purpose, use or function whatsoever except in connection with production at and transportation from those deposits.

The legal principles that control in this case may be summarized as follows:

> The domiciliary state of incorporation "remains the permanent situs" for taxation of tangible "personal

property which has not acquired an actual situs elsewhere" by virtue of its presence and use in another jurisdiction. When movable equipment "is habitually employed in several states * * * it cannot be said that any of the states is entitled to tax the entire" value thereof "regardless of" its "use in the other states" but can tax only on the basis of just and equitable apportionment "which is consistent with the like jurisdiction of other states". The doctrine of "tax apportionment in these interstate commerce situations" is the "basis" on which "the tax laws have been framed and administered" and such "doctrine of tax apportionment * * * forming a part of the organic life of these states" is "a part of the taxing systems of this country" and "the rule of apportionment * * * has established itself in regard to" land and water commerce. The tax must be "duly apportioned" in accordance with a "fair method of apportionment" whereby the tax imposed in each jurisdiction "cannot be duplicated" or "repeated by any other state" so that an instrument of "interstate transportation" will not be required to "bear more than a fair share of the cost of" each "local government whose protection it enjoys". Due process requires that "the tax in practical operation" shall have "relation to opportunities, benefits, or protection conferred or afforded" and such "requirements are satisfied if the tax is fairly apportioned to the commerce carried on within the State." *Central Greyhound Lines, Inc.* v. *Mealey*, 334 U. S. 653, 68 S. Ct. 1238, 92 L. Ed. 1633 (1948), *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1948), *Northwest Airlines, Inc.* v. *Minnesota*, 322 U. S. 292, 88 L. Ed. 1283 (1944), *Western Live Stock* v. *Bureau of Revenue*, 303 U. S. 250, 82 L. Ed. 823 (1938), *Wheeling Steel Corporation* v. *Fox*, 298 U. S. 193, 80 L. Ed. 1143 (1936), *Johnson Oil Refining Co.* v. *Oklahoma*, 290 U. S. 158, 78 L. Ed. 238 (1933), *New York C. & H. R. R. R. Co.* v. *Miller*, 202 U. S. 584, 50 L. Ed. 1155 (1906), *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S. 688, 39 L. Ed. 311 (1895), *Pullman's Palace Car Co.* v. *Pennsylvania*, 141 U. S. 18, 35 L. Ed. 613 (1891), *Marye* v. *Baltimore & O. R. R. Co.*, 127 U. S. 117, 32 L. Ed. 94 (1888), *Queen City Brewing Co.* v.

District of Columbia, 134 F. (2d) 44 (1943), Cert. denied 319 U. S. 767, 87 L. Ed. 1716 (1943), *Ott* v. *Mississippi Valley Barge Line Co.*, 336 U. S. 169 (1949).

The District of Columbia seeks to avoid the consequences of the *facts* and *authorities* which control in this case by ignoring both and relying upon its wholly untenable "commercial domicile" argument just as though intangibles instead of tangibles were involved. And its commercial domicile argument is made here, as it was below, without even citing—much less discussing—this Court's opinion in *Wheeling Steel Corporation* v. *Fox, supra,* which settles the point against the District.[5]

The three cases relied upon by the District of Columbia in support of its commercial domicile argument clearly illustrate its utter lack of support. These cases are *Md. & Va. Milk Producers Ass'n* v. *District of Columbia,* 73 App. D. C. 399, 119 F. 2nd 787 (1941), *International Milling Co.* v. *Columbia Transportation Co.*, 292 U. S. 511, 54 S. Ct. 797, 78 L. Ed. 1396 (1934), and *First Bank Stock Corp.* v. *Minnesota*, 301 U. S. 234, 57 S. Ct. 677, 81 L. Ed. 1061 (1937).

In *Md. & Va. Milk Producers Ass'n.* v. *District of Columbia, supra,* the Court was dealing with the taxability of intangibles and quite properly held that as to intangibles a commercial domicile may serve as a basis for taxation under the authority of *Wheeling Steel Corporation* v. *Fox, supra.*

In *International Milling Co.* v. *Columbia Transportation Co., supra,* it was held that a Delaware corporation having its principal place of business in Ohio and operating ships in Minnesota "not merely occasionally, but by long continued practice" was subject to suit in Minnesota. The case seems to have no possible bearing on the problem here.

[5] If the question of commercial domicile as to respondent's scows, tugs, and launches were of importance in this case it would seem that the registered home port of Alexandria, Va., from which direction and control of the equipment is principally carried on, would have an equal or greater claim than the District of Columbia.

In *First Bank Stock Corp.* v. *Minnesota, supra,* it was held that a Delaware corporation having its commercial domicile in Minnesota was subject to the latter state's intangibles tax with respect to stock certificates owned and kept in Minnesota under the authority of *Wheeling Steel Corporation* v. *Fox, supra.*

Clearly, the District of Columbia finds no support in the decided cases for its commercial domicile argument in this case. The applicable provisions of the Constitution make it plain why no such support can be found.

Article I, Section 8 of the Constitution grants to Congress exclusive legislative power over the District of Columbia as follows:

> "To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dockyards, and other needful Buildings."

Certainly, it is self-evident that the Constitution did not empower Congress to impose tangible personal property taxes for the benefit of the District of Columbia—at full value, with no apportionment—on personality having a taxable situs on the basis of apportionment or otherwise, in any state or states.

Article I, Section 9 of the Constitution provides as follows:

> "No capitation, or other direct, tax shall be laid, unless in proportion to the census or enumeration hereinbefore directed to be taken."

It has long been settled that Congress could not impose an *ad valorem* tax on tangible personal property subject to taxation in the states, unless in proportion to the census

even for the benefit of the Federal government itself. *Pollock* v. *Farmers' Loan & Trust Co.*, 157 U. S. 429, 39 L. Ed. 759, 810, 811, 816 (1895) rehearing 158 U. S. 601, 39 L. Ed. 1108, 1119, 1125 (1895). *A fortiori*, Congress could not impose for the benefit of the District of Columbia a direct tax of any nature against the full value of tangible personal property subject to taxation in the States and belonging to a corporation created by one of the states. Just as surely as the States retained no power to impose tax on an agency of the United States (*M'Culloch* v. *Maryland* (1819), 4 Wheaton 316, 4 L. Ed. 579), it would seem that they did not by the Constitution authorize Congress to impose *ad valorem* tax within the states for the benefit of the District of Columbia (*Cf. Fargo* v. *Hart*, (1904) 193 U. S. 490, 499, 500, 48 L. Ed. 761, 765).

Clearly, the due process of law requirements of the Fifth Amendment apply to the District of Columbia and protect the respondent against the exaction involved in this case. *Ott* v. *Mississippi Valley Barge Line Co., supra.*

CONCLUSION.

The opinion of the Court below is correct. The issue involved is one of very limited local application. There is no conflict of decision. The petition for writ of certiorari should be denied.

Respectfully submitted,

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